SUPPORTING BRIEF.

VI. Statement of the Case.[7]

Petitioner's electric system centers in Houston where its main generating plants are located (R. 72A, 73) and furnishes electric service in all or parts of nine adjoining counties (R. 75). Generating plants, transmission lines and substations consist of 70 per cent of the investment used to furnish the service (R. 76) and none of these classes of property is located or operated within the City of West University Place (R. 72A).

Petitioner installed its lines in the area now comprising said City in 1920 and began service in 1921 (R. 64) under authority of the State statute providing the right of way powers and privileges of electric corporations.[8] The area was not incorporated as the City of West University Place until 1925 (R. 63), and petitioner continued to furnish service therein as before[9] until petitioner's fifty year franchise was granted May 29 and duly accepted May 31, 1930 (R. 12).

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[7] This statement is intended to be read with the Summary Statement and Jurisdictional Statement of the petition, *supra*, pp. 2-3; 3-12.

[8] Art. 1436. Right of way.—Such corporation shall have the right and power to enter upon, condemn and appropriate the lands, right of way, easements and property of any person or corporation, and shall have the right to erect its lines over and across any public road, railroad, railroad right of way, interurban railroad, street railroad, canal or stream in this State, any street or alley of any incorporated city or town in this State with the consent and under the direction of the governing body of such city or town. Such lines shall be constructed upon suitable poles in the most approved manner and maintained at a height above the ground of at least twenty-two feet; or pipes may be placed under the ground, as the exigencies of the case may require. (Acts, 1911, p. 228.)

[9] There is no Texas decision defining the franchise rights of a utility which has begun service in an area which is unincorporated after that area becomes a municipal corporation. For the general rule, see Note, *Cloverdale Homes* v. *Cloverdale*, 47 L. R. A. (N. S.) 607, and *Tulsa* v. *S. W. Bell Tel. Co.*, 75 F. (2d) 343, 356.

1. *Petitioner's franchise:*[10] City's obligation is to grant petitioner, "its successors and assigns, the right, privilege and franchise" to use City's present and future public thoroughfares and grounds for electric poles, lines and fixtures for fifty years, Secs. 2, 8 (R. 13, 14).[11]

There is no dispute about the existence or nature of the franchise contract (*Cf. Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 100) or about petitioner's full compliance with the obligations of the franchise and of the undertaking. Respondents stipulated in the District Court that "said franchise is now in full force and effect."[12]

2. *Ordinance 129:* The ordinance was passed (Jan. 4, 1938) without giving petitioner notice or hearing (R. 4, 90). Failing to get the ordinance repealed as to it, petitioner promptly (Feb. 16, 1938) filed this suit (R. 1, 10).

(a) *Purpose of the ordinance:* The ordinance is entitled one "fixing the rentals to be paid by" the four types of utility company named therein "for the privilege of using with their poles, wires * * * and fixtures the streets * * * within the City" and declares (Sec. 13) that the fact that this use has been made by these companies "for many years without the payment of rent" creates an emergency (R. 15, 18). City's mayor testified that the ordinance was passed to raise revenue to meet the expense of running the municipal government and that August 1 was fixed as the date for paying the rental because that was the time of year

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[10] The franchise is not exclusive. See Sec. 6 (R. 14) and compare *Ennis Water Works* v. *Ennis*, 233 U. S. 652, 657, 658.

[11] Petitioner's obligations are to interfere as little as possible with traffic (Sec. 3), to furnish first class service (Sec. 4), to hold City harmless (Sec. 5) and to maintain City of Houston rates for residential and commercial service and rules for extension of service (R. 13, 14). An additional consideration for granting the franchise was the lower rate for municipal water pumping obtained by City under the rate schedule applying in cities where petitioner's property and right to do business are protected by franchise (R. 66).

[12] The case was tried July 25-29, 1938 (R. 26).

City's tax collections were smallest (R. 89, 90). Respondents' counsel stipulated in the District Court that the ordinance was being defended as imposing a rental, not a "license tax" or "tax under the regulatory power" (R. 85, 86).[13] The Supreme Court held, on rehearing, that Ordinance 129 imposes a rental charge, in accordance with the distinction between rental charges and excise taxes pointed out in *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92, 97, wherein a rental charge was defined as "in the nature of a charge for the use of property belonging to the city—that which may properly be called rental", as "a demand of proprietorship" and not "a demand of sovereignty" (citing *State Freight Tax* case, 15 Wall. 232, 278) and as a charge graduated in amount by the amount the streets are used and of such nature that the "amount to be paid is not graduated by the amount of the business".[14]

(b) *The practical operation and effect of Ordinance 129, as construed and upheld, on petitioner's franchise:* The ordinance operates on the franchise grant itself,[15] the frankly avowed purpose being to increase its burdens

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[13] The State police power cannot be used to raise revenue, except as incidental to police regulation and in an amount reasonably necessary to defray the cost thereof, and when the primary purpose of legislation imposing a charge is to raise revenue, the act must be sustained, if at all, under the tax power. The *Chain Store Tax* cases (*Hurt* v. *Cooper*), 130 Tex. 433, 438, decided in 1938. Accord: *Hoefling & Son* v. *San Antonio* (1892), 85 Tex. 228, 232. Respondents' stipulation that Ordinance 129 was being defended solely on the ground that it levied a rental charge was made during petitioner's proof, which is not disputed, that inspection of petitioner's lines by City employees is unnecessary because of automatic safety devices and petitioner's own inspection system (R. 79-81; 92-94).

[14] The St. Louis pole charge ordinance was finally held invalid as impairing the obligation of contract and being excessive in amount. *St. Louis* v. *Western Union Tel. Co.*, 63 Fed. 68, 72, 76: aff. 166 U. S. 388 (on failure to properly reserve questions for review).

[15] The distinction made is between the primary reciprocal obligations of a franchise, i. e., the grant of right of way for public utility service in return for grantee's undertaking to furnish that service, and the other obligations of the contract, such as the rates to be charged for the service. No case has come

(*Boise Water Co.* v. *Boise City*, 230 U. S. 84, 92; *Columbia Ry.* v. *South Carolina*, 261 U. S. 236, 251. As the means to this end, the ordinance makes petitioner's further use of the streets under the franchise [16] unlawful and subject to penalties of $100 a day (Sec. 9), requires petitioner to accept and recognize City's receipt for the annual rental payment as the sole authority for use of the streets thereafter (Sec. 4), and reserves to the City the right to cancel the authority conferred by the receipt (Sec. 7) by refunding "the unearned rentals paid to the City" (R. 16).

3. *The holding of the Court of Civil Appeals:* This Court held that petitioner's franchise was a grant from the State under Article 1436 (*supra*, p. 15) and that Ordinance 129 was void because the payment of compensation for the franchise was not a condition which City was authorized by the statute to impose when granting its consent to the use of the streets for electric service.[17]

4. *The holdings of the Supreme Court:* The Court held that franchises for electric distribution were not granted

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before this Court from Texas in which it has been seriously contended that the accepted franchise grant itself is not a contract *pro tanto*. Cf. *San Antonio Trac. Co.* v. *Altgelt*, 200 U. S. 304, 308, cited with approval in *Dallas Ry. Co.* v. *Geller* (1925), 114 Tex. 484, 488.

[16] That is, under the terms of the franchise as offered and accepted, and as interpreted by the parties from May 31, 1930 to August 1, 1938. Cf. *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 118.

[17] The court relied principally upon *Galveston & W. Ry. Co.* v. *Galveston* (1897), 90 Tex. 398, 412, 413, holding void the section of a railroad franchise granted by the City of Galveston which conditioned the grant on the extension of the railroad across Galveston Bay in 5 years and upon *Ft. Worth Gas Co.* v. *Latex Oil & Gas Co.*, 299 S. W. 705, 709, writ refused Dec. 1927, 118 Tex. 674, holding that a city charter provision requiring that a gas franchise become effective only if approved at a referendum election was inconsistent with Art. 1497, R. C. S., Tex., 1925, which statute granted right of way over streets "with the consent and under the direction of the governing body of such city or town".

by the State under Article 1436, but were granted by the city or town which, under Article 1016,[18] had exclusive control of its streets, and hence could condition a franchise granting their use for electric distribution lines upon the payment of compensation for the privilege granted (R. 110). The Court held that "the authorities above considered clearly sustain the right of cities to fix a rental charge for the use of its streets * * * by electric corporations which carry on a local business" (R. 110). The effect of this ruling, when applied to the facts of this cause, is to hold that a Texas city is empowered to impose a rental charge by such an ordinance as Ordinance 129 upon the holder of such a franchise as petitioner's.

The Court ruled that Ordinance 129 "is not invalid merely it provides for measuring the amount of the rental charge by a percentage" of petitioner's gross receipts in City, that "the material inquiry is not the method used to measure the rental charge, but rather the reasonableness of such charge" (R. 111) and that it could not be held as a

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[18] Art. 1016. Streets and alleys, etc.—Any incorporated city or town containing not more than five thousand population in this State shall have the exclusive control and power over the streets, alleys, and public grounds and highways of the city, and to abate and remove encroachments of obstructions thereon; to open, alter, widen, extend, establish, regulate, grade, clean and otherwise improve said streets; to put drains or sewers therein, and prevent incumbering thereof in any manner, and to protect same from encroachment or injury; and to regulate and alter the grade of premises; to require the filling up and raising of same; and such city council shall also have power to alter or vacate the alley in any block of ground in the city upon written application of the owner of the block, or if there be more than one owner of such block, then upon the written application of all owners thereof uniting in such application; such alley so vacated shall thereupon revert to and become the property of the owner of the block of which it was a part, or if more than one, then to the owners of the adjoining lots therein, each extending to the center of the alley so vacated. (Acts 1889, p. 1; Acts 1913, p. 326; Acts 1917, p. 351; G. L. vol. 9, p. 1029.)

matter of law, that the charge here "is so unreasonable as to render the ordinance invalid".[19]

VII. Specification of Errors.

1. The Supreme Court of Texas erred in holding Ordinance 129 valid, and in refusing to hold that said ordinance is void because it impairs the obligation of petitioner's franchise contrary to Art. I, Sec. 10, Cl. 1 of the Federal Constitution.

2. The Supreme Court of Texas erred in refusing to hold Ordinance 129 repugnant to Sec. 1 of the 14th Amendment of the Federal Constitution:

(a) On the ground that the enforcement of said ordinance will deprive petitioner of the use of its franchise without due process of law;

(b) On the ground that the purpose of such ordinance is not governmental;

(c) On the ground that the means provided in the ordinance do not bear the requisite legal relation to the purpose and are arbitrary and oppressive.

3. The Supreme Court of Texas erred in denying petitioner the kind of determination of its Federal constitutional rights required by Art. VI, Cl. 2 and Cl. 3 of the Federal Constitution.

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[19] Reference has been made (*supra*, p. 17) to the holding on rehearing that the ordinance imposes a rental charge. The statement in the opinion on rehearing that it would be possible for petitioner to conduct its business in City without using the streets (R. 115), asserts a physical impossibility. City comprises 275 blocks, each block being separated from every other block on all four sides by streets (R. 87, 70A).

BRIEF OF ARGUMENT.

Summary of Argument.

Under the law of Texas, petitioner's franchise constitutes a contract and a substantial property right and the purpose of the subsequent rental ordinance is not public. The rental ordinance is repugnant to the Federal Constitution because it impairs the obligation of the franchise and deprives petitioner of its use without due process of law. The ordinance is arbitrary and oppressive because it employs a single element of the business, gross receipts, to measure the street rental charge and the amount of the charge is not graduated by the amount the streets are used or by the rental value of the street easement. The State court did not determine the Federal question of reasonableness upon evidence.

The Supreme Court of the State did not determine petitioner's Federal constitutional rights as required by Article VI, Clauses 2 and 3 of the Federal Constitution and by the decisions of this Court.

ARGUMENT.

1.

Petitioner's franchise constitutes a contract and a substantial property right.

As far as the primary contractual obligations created by the offer and acceptance of the franchise grant itself are concerned, the rule stated has always been the settled rule of law in Texas [20] and it was also settled, at the time pe-

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[20] In *Mayor* v. *Houston St. Ry. Co.* (1892) 83 Tex. 548, the Supreme Court of Texas, in affirming judgment restraining the City of Houston from interfering with the laying of tracks along a street covered by the company's fifty year street railway franchise (p. 554), reviewed the charter powers granted the company to furnish street railway service and the charter powers granted the City to control the use of its streets, and held, in overruling the contention

titioner's franchise contract was made, that even the rate provisions of the franchise were contractual and binding, despite the fact that the contract rates themselves might subsequently be changed by exercise of the reserved rate making power.[21] In *Texarkana* v. *Arkansas Gas Co.* 306 U. S. 188, this Court decided that the Texarkana gas franchise there involved was a contract under the Texas law as determined by the Supreme Court of Texas in 1925. The Texarkana franchise was accepted June 18, 1930 (97 F. (2d) 6) and the franchise involved in this cause was accepted May 31, 1930 (R. 12).

In 1902, the Supreme Court held in *Dallas* v. *Dallas St. Ry. Co.*, 95 Tex. 268, 275, that a street railway franchise granted by the city was property assessable for city tax purposes, and the value of the franchise could either be combined with the value of the tangible property, or that the franchise could be "separately assessed and valued as a distinct article of property". This decision has been uniformly followed.[22]

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that the 50 year term of the franchise was unreasonable, that the City's charter powers conferred "upon the city government plenary powers at least to make any contract (otherwise valid) with this company in reference to the establishing and constructing of its street railway, and in express terms contemplates the granting upon the part of the city, by contract or otherwise, the necessary rights and privileges to effectuate this purpose" (p. 554) and that the franchise "grant having been duly accepted and acted upon by appellee, became a vested right or perfected contract which could not be subsequently repealed or impaired by the common council or the authorities of the city of Houston"; 83 Tex. 555, 558. The authority of *Mayor* v. *Houston St. Ry. Co.* was confirmed in 1925 by *Dallas Ry. Co.* v. *Geller*, 114 Tex. 484, 488.

[21] In 1925, the Supreme Court of Texas held in *Dallas Ry. Co.* v. *Geller*, 114 Tex. 484, 488, that Article I, Sec. 17 of the Texas Constitution (copied in footnote 22, 306 U. S. 201) was not an inhibition to contract, but was a reservation of control so far as a rate provision of a franchise was concerned. Accordingly, this Court held that its decisions in *San Antonio* v. *San Antonio Pub. Serv. Co.*, 255 U. S. 547, and *Houston* v. *Southwestern Tel. Co.*, 259 U. S. 318, were no longer applicable, and that in Texas the franchise, including the rate section, is a contract. *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 188, 198-202.

[22] The actual occupation of streets for railroad purposes pursuant to a franchise ordinance creates an easement which may be assessed with the company's

There has been no decision expressly modifying the Texas law of franchise contract as stated in the *Geller* and *Texarkana* cases, *supra*, or modifying the Texas law of franchise property rights as stated in the cases cited.[23]

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other taxable property "or be separately valued for taxation as a distinct item of property". *T. & P. Ry. Co.* v. *El Paso* (1935), 126 Tex. 86, 94, 95, the opinion quoting and approving the following from *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58, 65:

> "'That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases: * * *'." 126 Tex. 95.

Same holding upon the authority of *T. & P. Ry. Co.* v. *El Paso, supra*, in respect to the street easement occupied by telephone lines: *Ft. Worth* v. *S. W. Bell Tel. Co.* (5th Cir.), 80 F. (2d) 972, 975, wherein the following from *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 661, was quoted and followed:

> "'* * * Such a street franchise has been called by various names, * * * but, howsoever designated, it is property. * * * Being property, it was taxable, alienable, and transferable.' * * *." 80 F. (2d) 975.

In 1935, the Court contrasted the vested right held under a utility franchise with the mere license to use the streets for taxicabs. *Parsons* v. *Galveston*, 125 Tex. 568, 576, 577. A gas franchise was held to be a property right that would support an injunction when sought by the franchise holder against use of the streets by a competitor not similarly authorized. *Northern Tex. Util. Co.* v. *Community Nat. Gas Co.* (C. C. A.) 297 S. W. 904, 908, writ refused Nov. 1927, 118 Tex. 686. In June 1927, Art. 1728 R. C. S., Tex., 1925, which prescribes the jurisdiction of the Supreme Court (conformably to the State Constitution) was amended to include the following:

> "In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction."

[23] *Mayor* v. *Houston St. Ry. Co.* (1892), 83 Tex. 548, 555; *Dallas* v. *Dallas St. Ry. Co.* (1902), 95 Tex. 268, 275; *Parsons* v. *Galveston* (1935), 125 Tex. 568, 576, 577; *T. & P. Ry. Co.* v. *El Paso* (1935), 126 Tex. 86, 94, 95. A Texas city can collect rent for property the city holds in trust for public use only by contract, and not by unilateral legislative power. *Macdonell* v. *I. & G. N. Ry. Co.* (1883), 60 Tex. 590, 595.

2.

The purpose of the rental ordinance is not public.

When a Texas city uses (*Ft. Worth* v. *Wiggins* (Com. App.), 5 S. W. (2d) 761, 764, decided in 1928) or grants the use of (*Scroggins* v. *Harlingen* (1938), 131 Tex. 237, 247, 248) public property for local profit and gain, the purpose is proprietary, not governmental. Accord: *Galveston* v. *Posnainsky* (1884), 62 Tex. 118, 127; *Ostrom* v. *San Antonio* (1901), 94 Tex. 523, 525, 526; *Amarillo* v. *Ware* (1931), 120 Tex. 456, 466. This Court recognizes the private capacity in which cities often act. *Vilas* v. *Manila,* 220 U. S. 345, 356.

3.

The ordinance is repugnant to the Federal Constitution.

The ordinance impairs the obligation of the franchise grant and deprives petitioner of all further beneficial use of its franchise. *Boise Water Co.* v. *Boise City,* 230 U. S. 84, 90, 93; *Louisville* v. *Cumberland Tel. Co.,* 224 U. S. 649, 660-665; *Russell* v. *Sebastian,* 233 U. S. 195, 204.[24] This Court held in each of the decisions cited that utility service such as petitioner's cannot be supported by right of way held under a revocable license, and that subsequent legislation having that effect defeats the purpose of the franchise grant.[25]

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[24] In the *Boise* case, the ordinance requiring the water company "to pay a monthly rental for the use of the streets" (p. 90) recognized the outstanding franchise by providing that the ordinance should not be "construed or understood as granting any privilege or authority for any other term than that provided for" in the franchise. 230 U. S. 89. Boise City did not seek to coerce payment of rental by making further operation under the franchise unlawful, but set up the claim for rentals by cross action in a suit brought to recover from Boise City for water service rendered (p. 86).

[25] *Louisville* case, 224 U. S. 661, 663, 664; *Boise* case, 230 U. S. 90, 91; *Russell* v. *Sebastian,* 233 U. S. 204, 206, 207, 210.

Ordinance 129 abolishes franchises for the four types of utility service named and in lieu thereof sets up a revocable license system. Under that system, petitioner keeps only the empty title to its franchise—empty because petitioner cannot operate under the franchise. By paying the rental, petitioner can get the maximum franchise privilege which the rental ordinance permits and this would be true if petitioner had no franchise and was a naked trespasser upon City's streets. This maximum franchise privilege is something less than an annual license; no *absolute* right is given to continue occupancy by paying rental. The authority given by the rental receipt is cancelable by City at any time without notice or cause by refund of the "unearned" portion of the last rental payment, Sec. 7 (R. 16).

Claim that the ordinance is arbitrary is based on *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 92, 97 and *New Jersey Tel. Co.* v. *Tax Board*, 280 U. S. 338, 348, 349 [26] and error from the failure of the State court to determine the Federal question of reasonableness upon *evidence* is predicated upon *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415, 416.[27]

4.

Petitioner's Federal rights were infringed by the way in which its appeal for constitutional protection of its contract and property rights was determined by the Supreme Court of Texas.

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[26] The gross receipts charge levied by this ordinance does not possess the elements of a street rental charge (148 U. S. 97) and is not a permissible standard of rental value when legislatively imposed (280 U. S. 348, 349).

[27] Much of the evidence relied upon by petitioner to support the Federal question of reasonableness went to the method of measuring the charge. The Supreme Court ruled that the method was not the material inquiry (R. 111). Having so ruled, petitioner contends that the court could not then have examined these evidentiary facts.

The record in the State Supreme Court (R. 106-123) presents a clear case of judicial failure to support and be bound by the Federal Constitution, viz:

1. Of "the authorities above considered" in the original opinion (R. 110), the only decision dealing with street rental charges is the *Dallas Telephone* case (174 S. W. 636), decided by the Dallas Court of Civil Appeals in 1915 on two erroneous theories (a) that Art. I, Sec. 17, Tex. Const. is an inhibition to contract and (b) that imposition of street rental charges is an essential sovereign power. 174 S. W. 639.

2. In the *Geller* case (114 Tex. 484, 488), the "inhibition to contract" theory was expressly denied.[28] The *Geller* case, decided in 1925, is the State law of petitioner's franchise contract made May 31, 1930 (R. 12), as it was of Texarkana franchise contract made June 18, 1930. *Texarkana* v. *Arkansas Gas Co.*, 306 U. S. 199, 200.

3. When the Supreme Court, on rehearing, held that Ordinance 129 imposed a rental charge (R. 115) it was settled that the ordinance was an attempt to exercise proprietary, not sovereign, power. Then the Federal questions of impairment and deprivation became ripe for decision, and their determination was controlled by the decisions of this Court cited *supra* p. 24.

4. Even if the Supreme Court had squarely overruled its prior decisions cited *supra* pp. 22-23, it would not have created a supportable non-Federal ground for its judgment,

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[28] The Supreme Court decided the *Geller* case in 1925 upon writ of error to the Dallas Court to clarify and harmonize the State law because of expressions in the opinion below (245 S. W. 256) which had been construed by the City Attorneys (114 Tex. 487) as confirming the "inhibition to contract" theory on the authority of the *Dallas Telephone* case, the *Altgelt* case (200 U. S. 304, 81 S. W. 106) and the later *San Antonio* case (255 U. S. 547). See *Geller* v. *Dallas Ry. Co.* (1922), 245 S. W. p. 256.

because of the decisions by this Court holding that a State may not, by upholding subsequent infringing legislation by subsequent change of judicial decision, defeat the object of a prior grant, or destroy contracts or take substantial property rights.

5. By upholding the validity of the ordinance without passing expressly upon the Federal questions or else pointing out a non-Federal ground adequate to support the judgment, and by adopting a third course—silence—the State Supreme Court failed to discharge an imperative obligation and denied petitioner its Federal constitutional rights (Art. VI, Cl. 2, 3), *Martin* v. *Hunt's Lessee*, 1 Wheat. 304, 340, 341, 342, 344, 347-349; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 282.

Prayer.

Petitioner prays that certiorari be granted and, upon submission, for reversal.

Respectfully submitted,

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